

PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF DELAWARE

SMYRNA EDUCATORS' ASSOCIATION)

PETITIONER,)

)

and) D.S. No. 89-10-046

)

BOARD OF EDUCATION OF THE)

SMYRNA SCHOOL DISTRICT)

RESPONDENT.)

JURISDICTION

The Public Employment Relations Board (hereinafter the "PERB" or "Board") has been requested to advise the parties concerning the legality of a "service fee" under the provisions of The Public School Employment Relations Act, 14 Del. C. chapter 40 (hereinafter the "Act"). The Board of Education of the Smyrna School District (hereinafter "District" or "Respondent") is a public employer within the meaning of 14 Del. C. section 4002 (m), of the Act. The Smyrna Educators' Association (hereinafter "Association" or "Petitioner") is the exclusive bargaining representative of the public school employer's certificated professional employees within the meaning of 14 Del. C. section 4002 (h), of the Act.

STATEMENT OF FACTS

Following a period of protracted negotiations, the parties reached agreement concerning the terms of a collective bargaining agreement to succeed the labor contract which expired June 30, 1988. In the course of the negotiations the Association proposed the following language concerning the issue of union security:

A. All certified employees in the bargaining unit who do not become or do not remain members, will, during such period of nonmembership, pay to the Association by payroll deduction a service fee {1} set by the Association.

The District refused to bargain over the proposal claiming that it is prohibited by sections 4003 (1) and 4004(c) of the Public School Employment Relations Act and, therefore, illegal. The petitioner's proposal was not included in the collective bargaining agreement approved by the parties. On October 12, 1989, the petitioner filed this Petition for Declaratory Statement, seeking a determination that the proposed language is both legal and negotiable. Briefs were

{1} A service fee is a fair and proportional share of the cost of representation payable by bargaining unit members who are not members of the employee association, itself. A service fee is applied exclusively to the cost of representation while the dues paid by the association's general membership may be applied to other expenses incurred in furthering the overall objectives of the Association.

submitted in accord with the schedule agreed to by the parties.

STATUTORY PROVISIONS

14 Del. C., Chapter 40:

Section 4001. Statement of policy.

It is the declared policy of the State and the purpose of this chapter to promote harmonious and cooperative relationships between reorganized public school districts and their employees and to protect the public by assuring the orderly and uninterrupted operations and functions of the public school system. These policies are best effectuated by:

- (1) Granting to school employees the right of organization and representation;
- (2) Obligating boards of education and school employee organizations which have been certified as representing their school employees to enter into collective bargaining negotiations with the willingness to resolve disputes relating to terms and conditions of employment and to reduce to writing any agreements reached through such negotiations; and.
- (3) Establishing a public employment relations Board to assist in resolving disputes between school employees and boards of education and

to administer this chapter.

Section 4003. School employee rights.

School employees shall have the right to:

- (1) Organize, form, join or assist any employee organization, provided that membership in, or an obligation to pay any dues, fees, assessments or other charges to, an employee organization shall not be required as a condition of employment.
- (2) Negotiate collectively or grieve through representatives of their own choosing.
- (3) Engage in other concerted activity for the purpose of collective bargaining or other mutual aid and protection insofar as any such activity is not prohibited by this Chapter or any other law of the State.
- (4) Be represented by their exclusive representative, if any, without discrimination.

Section 4004. Employee organization as exclusive representative

(c) Any organization which has been certified as the exclusive representative shall have the right to have its dues deducted by the employer from the salaries of those employees, within the bargaining unit, who authorize, in writing,

the deduction of said dues. Such authorization is revocable at the employee's written request. Said deductions shall commence upon the exclusive representatives written request to the employer. Such right to deduction shall be in force for so long as the organization remains the exclusive representative for the employees in the unit. The public school employer is expressly prohibited from any involvement in the collection of fines, penalties or special assessments levied on members by the exclusive representatives.

Title 19 Chapter 11:

Section 1107. Withholding of wages.

No employer may withhold or divert any portion of an employee's wages unless:

- (1) The employer is required or empowered to do so by state or federal law; or
- (2) The deductions are for medical, surgical or hospital care or service, without financial benefit to the employer, and are openly, clearly and in due course recorded in the employers' books; or
- (3) The employer has a signed authorization by the employee for deductions for a lawful purpose accruing to the benefit of the employee, except that the Department, upon finding that it is acting in the public interest, may, by regulation,

prohibit such withholding or diverting for such purpose. If the Department abuses its discretion or acts arbitrarily and without any reasonable ground, any aggrieved person may institute a civil action in Superior Court to have such regulation declared null and void. The Department, in such action, shall not be liable for any costs or fees of any nature.

PRINCIPAL POSITIONS OF THE PARTIES

ASSOCIATION: The Association maintains that the general grant of authority contained in Section 4001, Statement of policy, is sufficient to support the legality of the service fee arrangement embodied in the Union's proposed language and that a specific statutory grant of authority is unnecessary. The Association argues that the subject of a service or representation fee payable by bargaining unit members who are not members of the Association is a matter clearly related to wages, salaries and working conditions which, therefore, constitutes a mandatory subject of bargaining.

According to the Association, its proposed language does not conflict with Section 4003 (1) because it does not make the payment of a service fee a "condition of employment". Nor does the proposed language violate Section 4004 (c) which prohibits only the mandatory deduction of membership dues and is silent concerning the method for collecting service fees or other types of financial obligations.

The Association maintains that the legislature was clearly aware of the difference between dues and fees at the time of the Act's

passage, as evidenced by the language of section 4003 (1), Employee rights. The Association argues that the failure of the legislature to also include in Section 4004 (c) the requirement of a prior authorization for the collection of "fees" leaves the subject open for discussion and agreement by the parties through the collective bargaining process. The Association maintains that this conclusion represents a logical and realistic manifestation of legislative intent since nonmembers would be less likely to voluntarily pay a service fee than would be members to pay membership dues. In the case of the former, the only alternative to payroll deduction available to the Association would be the constant filing of individual lawsuits which would unnecessarily burden the court system.

DISTRICT: The District argues that since there is no common law right to collectively bargain, there can be no common law right for public employees and/or their unions to have dues or service fees automatically deducted. The District concludes that since there is no Delaware statute which specifically authorizes the deduction of service fees from the salaries of Delaware teachers, the union's proposal is illegal.

According to the District, even if service fees, per se, are not illegal, Section 1107 of the Wage Payment and Collection Act 19 Del. C. (Sections 1101-1115), 1952 limits the employer's authority to "withhold or divert any portion of an employee's wages" unless it is either required or empowered to do so by law, or the deduction is for health related benefits, or the employee has authorized the deduction, in writing. The District argues that Section 4004 (c) authorizes only the voluntary deduction of membership dues and, therefore, creates no

right for the deduction of a service fee charged to members. Since there is no other statute which expressly empowers or requires the District to deduct a service fee, to do so would violate section 1107 of the Wage Payment and Collection Act.

Like the Association, the District maintains that the use of the terms "fees" and "dues" in section 4003 (1) evidences a clear recognition by the legislature of the distinction between the two. The District contends that had the legislature intended to authorize the deduction of service fees, it would have done so expressly in the statute by including it in section 4004 (c), along with dues.

The District argues that even if fees are determined to be included within the scope of membership dues, their automatic deduction would violate the requirement of section 4004 (c) that payroll deductions for dues must be authorized.

ISSUES

1. Is a service fee charged by an exclusive bargaining representative to bargaining unit members who are not members of the exclusive representative association prohibited under the Act and, therefore, illegal?
2. If a service fee is determined not to be illegal, does it then constitute a mandatory or permissive subject of bargaining under section 4002 (p) of the Act?
3. Is the specific language proposed by the Association which is at issue in this matter legal, under the Act?

DISCUSSION

The collective bargaining agreement reached by the parties in December, 1989 and ratified in January, 1990, expires on June 30, 1990. Section 4013 of the Act requires the parties to commence bargaining at least 90 days prior to the expiration date. The matter of a service fee was the source of contention during the recently concluded negotiations and is expected to be a difficult issue during the approaching negotiations. Under these circumstances, it is appropriate under Rule No. 6, Petitions for Declaratory Statements, of the Board's Rules and Regulations, for the PERB to issue the requested declaratory statement.

The subject of a service fee, payable to an exclusive bargaining representative by employees who are not members of the employee organization, involves the question of union security which has not been previously addressed by the PERB.

Section 4003, Employee rights, of the Public School Employment Relations Act confers upon public school teachers the right to "organize, form, join or assist any employee organization provided, however, that membership in, or an obligation to pay dues, fees, assessments or other charges does not constitute a condition of employment". Although there is no express express right for employees to refrain from the specified conduct, the statutory creation of the right, itself, implies the existence of the contrary right to refrain from participating; otherwise, the statute would impose a legal duty or obligation rather than create a right.

The District's argument that the Legislature's failure to specifically address the subject of service fees renders such fees illegal, is unpersuasive. Unlike the authorizations of a statute

enacted by the legislature, inaction or silence is ambiguous and susceptible to varied and, at times, conflicting interpretations. To determine the meaning or implication of legislative silence or missing language necessarily requires guesswork and conjecture, neither of which qualifies as an accepted or reliable method of statutory interpretation.

It is clear from an overall reading of the Act that the certified exclusive representative is required to represent all employees within the certified bargaining unit, regardless of whether those employees are also members of the employee organization. Conversely, all bargaining unit members are entitled to be represented by and share in the benefits resulting from the efforts of the exclusive representative.

In fulfilling its statutory obligation to represent all members of the bargaining unit, the exclusive representative participates in activities such as the negotiation and administration of collective bargaining agreements and the representation of employees in dispute settlement proceedings. In its representative capacity, the exclusive representative may employ staff personnel and, from time to time, contract the services of professionals knowledgeable in the specialized field of labor-management relations. In jurisdictions where, as here, membership in, or the obligation to pay dues, fees and assessments to labor organization may not legally constitute a condition of employment, there arises the potential for the "free-rider". [2]

[2] A member of a bargaining unit who does not become a (cont. p. 11)

The concept of a service fee represents an effort by the exclusive representative to eliminate the free-rider by fairly and proportionally distributing the cost of representation among all bargaining unit employees. A service fee is consistent with the exclusive representatives' duty to provide representation to all bargaining unit members, without discrimination. 14 Del.C. section 4003. Service fees provide the financial support required for the meaningful involvement of the exclusive representative in the specific functions deemed necessary by the Legislature if the state's employee relations objectives (as enumerated in section 4001 of the Act) are to be accomplished. Foremost in the minds of the legislators was the obligation of the parties to collectively bargain over terms and conditions of employment. Section 4002 (p) of the Act requires public school system to collectively bargain with the certified bargaining representative concerning terms and conditions of employment.

Prior to the passage of the Public School Employment Relations Act in 1983, the relations between the reorganized public school districts and their certificated professional teachers were governed by The Professional Negotiations and Relations Act of 1969. In limiting the scope of the bargaining obligation under this law, the Delaware Supreme Court concluded:

In the ascertainment of legislative intent and the construction of 14 Del. C. Chapter 40, it is quite

[note {2} continued] ...member of the association and, therefore, makes no financial contribution while enjoying the benefits derived from the efforts of the association.

significant that in the 1969 Act covering teachers and school administrators the General Assembly deliberately deprived them of the broad enumeration of subjects authorized in 1965 for collective bargaining by other public employees. [Delaware Right of Employees to Organize Act, 19 Del. C. , Chapter 13.]....If the General Assembly had intended to authorize the Board to include any relevant matter in a collective bargaining negotiation and contract with teachers and school administrators, it would have known how to define more broadly the subjects authorized for collective negotiations and contracts. Colonial School Board v. Colonial Affiliate, Del. Supr., 449 A.2d 243 (1982).

Consistent with the Court's decision in Colonial, (Supra.) the PERB has previously determined that when passing the current Act covering teachers in 1983, the General Assembly deliberately returned to a broad enumeration of subjects similar to that authorized in 1965 for collective bargaining for other public employees. Appoquinimink Education Association v. Board of Education of the Appoquinimink School District, Del. PERB, U.L.P. No. 1-3-84-3-2A (8-14-84). The phrase "... 'matters concerning or related to' in Section 4002 (p) of the Public School Employee Relations Act mandates a broad and encompassing scope of negotiability. It is clear that the legislature intended all matters concerning or related to the specified terms and conditions of employment to be mandatorily bargainable unless statutorily reserved to the exclusive prerogative of the public school employer". Appoquinimink Ed. Assoc. v. Bd. of Ed., (Supra., p.11) .

The District cites no law which reserves the subject of service fees to the exclusive authority of the public school employer, as provided for in Section 4002 (p). In the absence of such authority, the subject of a service fee, per se, does not constitute an illegal subject of bargaining.

Having so determined, it is necessary to next address the question of whether a service fee constitutes a term and condition of employment over which the parties are obligated to collectively bargain. To qualify as a term and condition of employment, a subject must constitute a matter "concerning or related to wages, salaries, hours, grievance procedure and working conditions". Clearly, a service fee does not involve either wages, salaries, hours or grievance procedure. The question, therefore, turns on whether it constitutes a "working condition", as envisioned by the legislature when it drafted Section 4002 (p). Other state jurisdictions in similar public sector statutes and the National Labor Relations Act, governing private sector labor-management relations, rely on the phrase "conditions of employment" as the catch-all category for determining mandatory subjects of bargaining. Delaware law, however, relies on the term "working conditions". While broader in scope than "physical working conditions" (the term used in the The Professional Negotiations and Relations Act of 1969), the term "working condition" is somewhat narrower than a "condition of employment". A working condition is one which relates generally to the job itself, i.e., to circumstances involving the performance of the responsibilities for which one is compensated or the opportunity and qualifications necessary to perform work required of those employees who are members of the certified

appropriate bargaining unit.

Such is not the case with a service fee. Although a service fee obligation arises directly and exclusively from the employment relationship and, in this limited sense, can be considered as a condition of employment, it has no substantive impact upon the employment status of an individual employee in any discernible manner. It is not a policy requirement which applies to all teachers, equally. It effects only those teachers who choose, for whatever reason, not to become Association members. Questions or disputes involving a service fee, such as the amount of the fee, the Association's use of the monies collected and the failure of an employee to pay the fee, necessarily involve only the individual employee and the exclusive representative. [3] Without attempting to define the outer boundaries of the meaning of the term "working conditions", as used in the Act, it can safely be said that the concept of a service fee does not rise to the level of a working condition. For this reason neither does it qualify as a term and condition of employment to which the duty to bargain attaches.

Yet to be resolved is the question of whether the specific proposal offered by the Association which, if agreed to by the District, would result in the automatic deduction of a predetermined sum of money from the wages of affected employees, without their consent, is legally permissible under the Act.

In deciding this matter, the Public Employment Relations Board is

[3] These types of questions or disputes may involve issues under Section 4007, Unfair labor practices enumerated, in which case they are within the jurisdiction of the PERB to resolve.

aware that the ultimate authority to resolve legal issues rests exclusively with the courts of this state. Without intending to usurp the role of the judiciary, this Board recognizes that in fulfilling its responsibilities under Section 4006 (h)(4) [4] it will periodically be required to interpret provisions of the Act. When called upon to do so, the Board will be guided by the comments of Chancellor Allen who declared the court's purpose in construing or interpreting a statute:

"... to attempt, in the specific setting of a concrete problem, to satisfy the legislative will or purpose as expressed generally in the statutory language. When that will or purpose has been expressed in clear language that clearly applies, there is no occasion for a court to do more than apply the language. If, however, that will or purpose has not been clearly expressed,

[4] Section 4006. Public Employment Relations Board., Section (h), To accomplish the objectives and carry out the duties prescribed in this chapter, the Board shall have the following powers: ...(4) To provide by rule a procedure for the filing and prompt dispositions of petitions for a declaratory statement as to the applicability of any provision of this Chapter or any rule or order of the Board. Such procedures shall provide for, but be not limited to, an expeditious determination of questions relating to potential unfair labor practices and to questions relating to whether a matter in dispute is within the scope of collective bargaining.

interpretation in order to deduce it is required. On other occasions it is reasonably plain that the legislature had no specific intention with respect to the specific problem that later arises. In that circumstance, the best technique to employ --- the one most consistent with the special, limited judicial role in our democracy --- is for the court to interpret the words used, in a manner consistent both with their ordinary usage and with the overall discernable intent of the statute.

Seaford Bd. of Education v. Seaford Education Assn.,

Del.Ch., C.A. 9491 (2/5/88), (Slip Op. at p. 7).

Section 4004 (c) of the Public School Employment Relations Act expressly prohibits only the automatic deduction of membership dues without the prior written authorization of the employee. It does not address the payment of service fees by nonmembers.

Section 4003 (1), Employee rights, guarantees the right of school employees to form, join or assist employee organizations provided that membership in, or an obligation to pay any dues, fees, assessments or other charges to the employee organization shall not be required as a condition of employment. (emphasis added)

The subject of "fees" is not addressed elsewhere in the statute; therefore, the question of whether a service fee may be automatically deducted, absent the authorization of the affected employee, is not specifically addressed. Whether the intent of the legislature has not been clearly addressed or the legislature had no specific intent is, in

this particular instance, more a matter of form than of substance.

Both parties agree that the language of Section 4003 (1) establishes an awareness by the legislature of a difference between the terms "dues" and "fees". The Association argues that if the legislature had intended to also limit the deduction of service fees by the "prior authorization" requirement contained in section 4004 (c) it could have easily done so simply by including therein the term "fees" along with the term "dues". The fact that it did not do so establishes that the deduction of a service fee is subject to be resolved to the mutual satisfaction of the parties through the collective bargaining process. In effect, the Association maintains that because the automatic deduction of service fees is not specifically prohibited by the statute it is permissible.

The District, on the other hand, argues that had the legislature intended to authorize the deduction of service fees, under any circumstances, it would have specifically done so as it did in the case of membership dues. The District maintains that because the specific deduction of service fees is not expressly authorized in the statute, it is illegal.

To resolve this question requires a consideration of the Wage Payment and Collection Act, 19 Del.C. sections 1101-1115 (1952), section 1107, Withholding of wages. Section 1107 prohibits an employer from withholding or diverting any portion of any employee's wages unless the employer is required or empowered to do so by state or federal law; or the deduction is for specified health related purposes; or the employee has authorized the deduction for a lawful purpose.

Clearly, the proposed service fee language does not pertain to

health coverage. Section 1107, however, requires that, where health benefit costs are not involved, to escape the requirement for prior authorization it is necessary that the employer be "required" or "authorized" to deduct the service fee by state or federal law. This statutory mandate is significant. The Association's argument in support of the automatic deduction of an appropriate service fee, without prior authorization, results not from a statutory "requirement" or "authorization", but rather from silence or the absence of a statutory prohibition. The Petitioner cites no statute, nor am I aware of any law which either requires or authorizes the public school employer to automatically deduct a service fee without the prior authorization by the employee. To permit the proposed deduction, under these circumstances, would violate the prior authorization requirement of Section 1107 (3) and is, therefore, impermissible.

DECISION

For the reasons stated, the subject of a service fee or appropriate fair share payment required of bargaining unit members who choose not to become members of the exclusive employee representative is not, per se illegal, under the Act. Because a service fee does not qualify as a working condition, it is not a term and condition of employment for which collective bargaining is required. Under these circumstances, it constitutes a permissive subject about which the parties are free to bargain, at their individual discretion. Because an automatic deduction, without the prior written authorization of the employee, is prohibited by Section 1107 (3) of the Wage Payment and Collection Act, the proposed language, in dispute in this matter, is

illegal.

CONCLUSIONS OF LAW

1. The Smyrna Educators' Association (DSEA, NEA) is an employee organization within the meaning of Section 4002 (g), of the Act.
2. The Smyrna Educators' Association is the exclusive bargaining representative of the school district's certificated professional employees within the meaning of section 4002 (j), of the Act.
3. The Board of Education of the Smyrna School District is a Public School Employer within the meaning of Section 4002 (m), of the Act.
4. A "service fee" charged by an exclusive bargaining representative to bargaining unit members who are not members of the exclusive representative association, does not violate Section 4003 (1) or Section 4004 (c), of the Act and is, therefore, legal.
5. The subject of a "service fee" does not constitute a term and condition of employment within the meaning of Section 4002 (p), of the Act and is not, therefore, a mandatory subject of bargaining.
6. The "automatic deduction" requirement contained in the language proposed by the Association violates Section 1107 of the Wage Payment and Collection Act and is, therefore, illegal.

Charles D. Long, Jr.
Charles D. Long, Jr.
Executive Director,
Delaware Public Employment
Relations Board

Deborah L. Murray-Sheppard
Deborah L. Murray-Sheppard
Principal Assistant
Date: January 25, 1990

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